A

UGONNA PHILIP NWANKWO v. PP

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
TENGKU MAIMUN TUAN MAT JCA
ZAKARIA SAM JCA
B [CRIMINAL APPEAL NO: B-05-198-08-2013]
15 JANUARY 2016

C ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 – Trafficking in dangerous drugs – Appeal against conviction and sentence – Presumption of knowledge and trafficking – Section 37(d) and 37(da) – Failure by trial judge to determine which presumption relied upon – Whether amounted to misdirection – Whether appellant rebutted presumption – Whether defence sufficiently considered – Whether conviction and sentence safe*

D ***CRIMINAL PROCEDURE:*** *Appeal – Appeal against conviction and sentence – Dangerous drugs – Trafficking – Presumption of knowledge and trafficking – Sections 37(d) and 37 (da) DDA 1952 – Failure by trial judge to determine which presumption relied upon – Whether conviction and sentence safe*

E SP5 and his team were on surveillance duty at Sunway Pyramid when SP5 saw the appellant carrying two bags. SP5 stopped the appellant and searched the two bags. Inside both the bags, SP5 found a total of five blocks of dried plant material suspected to be cannabis. Further, from the jeans worn by the appellant, SP5 seized seven plastic packets of dried plant material suspected to be cannabis and a bunch of keys. Subsequently, the appellant was brought to a house ('the said house') where SP5 found two other Nigerians, Moses F and Sani Wahab. Using one of the keys seized from the appellant, SP5 opened the door to the second room. Inside the second room, SP5 found, *inter alia*, (i) a bag containing 62 packets of dried plant material suspected to be cannabis; (ii) a shoe box containing 12 plastic packets of dried plant material suspected to be cannabis; (iii) a plastic packet containing dried plant G material suspected to cannabis; and (iv) a compressed block suspected cannabis. The drugs found in the said house formed the subject matter of the first charge while the drugs found on the appellant formed the subject matter of the second charge. The chemist ('SP6') confirmed the weight of the drugs to be 1,402g and 4,847.2g, as stated in the first and second charges H respectively. In respect of the first charge, having considered that the appellant had exclusive occupation and control of the second room, the trial judge found that there was an irresistible inference that the appellant had the requisite knowledge of the drugs. As for the ingredient of trafficking, the trial judge invoked the presumption of trafficking under s. 37(da) of the I Dangerous Drugs Act 1952 ('the Act'). In respect of the second charge, the trial judge concluded that trafficking was proven by either way *ie*, by direct

evidence or by invoking the presumption under the Act. The trial judge found that the prosecution had proved its case beyond reasonable doubt and thereby convicted and sentenced the appellant to death. Hence the present appeal. On appeal, the appellant contended, *inter alia*, that (i) the trial judge had erred in failing to make a definite finding as regards to the second charge *ie* (a) whether it was a case of deemed possession under s. 37(d) of the Act read with the acts of trafficking under s. 2 of the Act or (b) whether it was case of actual possession read with the trafficking presumption under s. 37(da) of the Act; (ii) the trial judge erred in failing to rule whether s. 37(da) presumption had been rebutted; and (iii) Moses and Sani Wahab were not called by the prosecution and not offered to the defence.

Held (allowing appeal; setting aside conviction and sentence of the High Court)

Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

(1) Reading the grounds of judgment as a whole, there was a doubt whether the *prima facie* case on the second charge was premised on presumed possession under s. 37(d) of the Act and trafficking under s. 2 of the Act or whether it was on actual possession and presumed trafficking under s. 37(da) of the Act. The approach of the trial judge in merely relying on the alternative without electing or making a finding whether it was actual or presumed possession and whether it was presumed or actual trafficking based on the evidence amounted to a misdirection. (paras 25 & 27)

(2) As for the first charge, the trial judge had invoked the presumption of trafficking under s. 37(da) of the Act. However, nowhere in the grounds of judgment of the trial judge did Her Ladyship made a finding of possession. Apart from the failure of the trial judge to make an affirmative finding of possession in respect of the first charge, Her Ladyship had also failed to make a finding of whether the appellant had rebutted the presumption of trafficking under s. 37(da). This omission was a material misdirection warranting appellate intervention. (paras 28 & 30)

(3) Moses and Sani Wahab were not fictitious characters. The trial judge did not make any finding regarding the non-calling of Moses and Sani Wahab although the issue was canvassed by the defence. Once evidence was placed before the court and submissions made, the trial judge was under a statutory duty to make a finding. The omission of the trial judge to do so had occasioned a failure of justice to the appellant. Therefore, the conviction was not safe. (paras 33, 36 & 37)

A ***Bahasa Malaysia*** *Headnotes*

SP5 dan pasukannya sedang menjalankan pengawasan di Sunway Pyramid apabila SP5 melihat perayu membawa dua buah beg. SP5 menahan perayu dan memeriksa kedua-dua beg. Di dalam kedua-dua beg, SP5 menjumpai sejumlah lima ketulan tumbuhan kering disyaki kanabis. Selanjutnya, dari
B seluar jeans yang dipakai perayu, SP5 merampas tujuh paket plastik bahan tumbuhan kering disyaki kanabis dan segugus kunci. Kemudian, perayu telah dibawa ke sebuah rumah ('rumah tersebut') di mana SP5 menjumpai dua warganegara Nigeria, Musa dan Sani Wahab. Menggunakan salah satu kunci yang dirampas daripada perayu, SP5 membuka pintu bilik kedua. Di dalam
C bilik kedua, SP5 menjumpai, antara lain, (i) satu beg yang mengandungi 62 paket bahan tumbuhan kering disyaki kanabis; (ii) satu kotak kasut yang mengandungi 12 paket plastik bahan tumbuhan kering disyaki kanabis; (iii) satu paket plastik yang mengandungi bahan tumbuhan kering disyaki kanabis; dan (iv) satu ketulan mampat disyaki kanabis. Dadah yang ditemui
D di dalam rumah tersebut menjadi perkara pertuduhan pertama manakala dadah yang ditemui pada perayu menjadi perkara pertuduhan kedua. Ahli kimia ('SP6') mengesahkan bahawa berat dadah masing-masing adalah 1,402g dan 4,847.2g, seperti yang dinyatakan dalam pertuduhan pertama dan kedua. Bagi pertuduhan pertama, setelah menimbangkan bahawa perayu
E mempunyai penghunian dan kawalan ekslusif bilik kedua, hakim bicara mendapati terdapat inferens yang tidak boleh disangkal bahawa perayu mempunyai pengetahuan mengenai dadah tersebut. Untuk intipati pengedaran, hakim bicara menggunapakai anggapan pengedaran di bawah s. 37(da) Akta Dadah Berbahaya 1952 ('Akta'). Bagi pertuduhan kedua,
F hakim bicara membuat kesimpulan bahawa pengedaran terbukti dengan keterangan langsung atau dengan menggunapakai anggapan. Hakim bicara mendapati bahawa pihak pendakwaan berjaya membuktikan kes melampaui keraguan munasabah dan dengan itu telah mensabitkan dan menjatuhkan hukuman mati terhadap perayu. Oleh itu rayuan ini. Dalam rayuannya, perayu menghujahkan, antara lain, bahawa (i) hakim bicara terkhilaf apabila
G gagal membuat dapatan muktamad mengenai pertuduhan kedua iaitu (a) sama ada ia adalah suatu kes milikan di bawah s. 37(d) Akta dibaca bersama dengan tindakan mengedar di bawah s. 2 Akta; atau (b) sama ada ia adalah suatu kes milikan sebenar dibaca dengan anggapan pengedaran di bawah s. 37(da) Akta; (ii) hakim bicara terkhilaf apabila gagal memutuskan sama ada
H anggapan s. 37(da) telah disangkal; dan (iii) Musa dan Sani Wahab tidak dipanggil oleh pihak pendakwaan dan tidak ditawarkan kepada pihak pembelaan.

I

Diputuskan (membenarkan rayuan; mengetepikan sabitan dan hukuman oleh Mahkamah Tinggi)
Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:

(1) Membaca alasan penghakiman secara keseluruhan, terdapat keraguan sama ada kes *prima facie* bagi pertuduhan kedua dibuat berdasarkan anggapan milikan di bawah s. 37(d) Akta dan pengedaran di bawah s. 2 Akta atau pun berdasarkan milikan sebenar dan anggapan pengedaran di bawah s. 37(da) Akta. Pendekatan hakim bicara dalam bergantung kepada alternatif tanpa memilih atau membuat keputusan sama ada ia milikan sebenar atau anggapan milikan dan sama ada ia pengedaran sebenar atau anggapan pengedaran berdasarkan keterangan adalah satu salah arahan.

(2) Bagi pertuduhan pertama, hakim bicara menggunapakai anggapan pengedaran di bawah s. 37(da) Akta. Walau bagaimanapun, tiada di mana-mana pun dalam alasan penghakiman hakim bicara membuat keputusan mengenai milikan. Selain daripada kegagalan hakim bicara membuat dapatan afirmatif mengenai pemilikan bagi pertuduhan pertama, hakim bicara juga gagal membuat keputusan sama ada perayu telah menyangkal anggapan pengedaran di bawah s. 37(da). Kegagalan ini merupakan salah arahan material yang mewajarkan campur tangan rayuan.

(3) Musa dan Sani Wahab bukan watak-watak palsu. Hakim bicara tidak membuat apa-apa dapatan mengenai kegagalan memanggil Musa dan Sani Wahab walaupun isu tersebut dibangkitkan oleh pihak pembelaan. Sebaik sahaja keterangan dikemukakan di hadapan mahkamah dan hujahan dibuat, hakim bicara mempunyai tanggungjawab statutori untuk membuat dapatan. Kegagalan hakim bicara untuk berbuat demikian telah menyebabkan ketidakadilan kepada perayu. Oleh itu, sabitan adalah tidak selamat.

Case(s) referred to:
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Bahram Nikkhouyabgram Nayed v. PP [2013] 6 CLJ 702 CA ***(refd)***
Lim Pah Soon v. PP [2013] 8 CLJ 800 CA ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Seyedalireza Seyedhedayatollah Ehteshamiardestani v. PP [2014] 4 CLJ 406 CA ***(refd)***
Soorya Kumar Narayanan v. PP [2009] 6 CLJ 257 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(d), (da)

For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Nurshafini Mustafha; DPP

[Appeal from High Court, Shah Alam; Criminal Trial No: 45A-280-09-2011 & 45A-281-09-2011 (overruled)]

Reported by Sandra Gabriel

A

JUDGMENT

Tengku Maimun Tuan Mat JCA:

[1] The appellant was convicted and sentenced to death by the High Court at Shah Alam on two charges of trafficking in dangerous drugs.

B

The Prosecution Case

[2] On 9 January 2010 at about 1pm, whilst Inspector Ihwan Hilmi bin Ismail (SP5) and his team were on surveillance duty at Sunway Pyramid, Subang Jaya, SP5 saw the appellant carrying two bags in his right hand. SP5 stopped the appellant and searched the two bags.

C

[3] The first bag had the word "Topman" written on it. Inside the "Topman" bag, there was another plastic bag which contained three blocks of dried plant material suspected to be cannabis, wrapped in transparent plastics.

D

[4] The second bag was a bag printed with the words "Walk In". Inside the "Walk In" bag, was a plastic bag which contained two blocks of dried plant material suspected to be cannabis, also wrapped in transparent plastics.

[5] From the jeans worn by the appellant, SP5 seized seven plastic packets of dried plant material suspected to be cannabis and a bunch of four keys.

E

[6] SP5 and his team together with the appellant proceeded to house No. 4, Jalan SS12/2D, Bandar Baru Subang, Subang Jaya (the said house). In the said house, SP5 found two other Nigerian, Moses and Sani Wahab in the hall. Using one of the keys seized from the appellant, SP5 opened the door to the second room. Inside the room, in the presence of the appellant, SP5 found a brown plastic bag with the word "Padini" printed on it. Inside the "Padini" bag, there were:

F

(i) A green "Jusco" bag in which there were 62 packets of dried plant material suspected to be cannabis;

G

(ii) A shoe box in which there were 12 plastic packets of dried plant material suspected to cannabis;

(iii) A plastic packet containing dried plant material suspected to cannabis; and

H

(iv) A compressed block of suspected cannabis.

[7] SP5 also found the appellant's Nigerian passport in the second room.

[8] The investigating officer, Inspector Rozlia binti Rozali (SP7) who later went to the said house found two copies of "To Send Money" and a receipt from "Sun Inn" in the name of the appellant in the second room.

I

[9] The drugs found in the said house formed the subject matter of the first charge while the drugs found on the appellant formed the subject matter of the second charge against the appellant.

[10] There was no issue insofar as the subject matter of the charges was concerned. The chemist Zulkefli bin Mohd Edin (SP6) who had analysed the drugs, confirmed that they were cannabis as defined under s. 2 of the Dangerous Drugs Act 1952 (the Act). SP6 had also confirmed the weight of the drugs, namely 1,402g and 4,847.2g, as stated in the first and second charges respectively.

Findings Of The High Court

[11] At the end of the prosecution case, the learned trial judge found that a *prima facie* case had been made out.

[12] In respect of the first charge, the learned trial judge found that the appellant occupied the second room. Having considered that the appellant had exclusive occupation and control of the room in question, the learned trial judge found that there was a strong and irresistible inference that the appellant had the requisite knowledge of the drugs.

[13] As for the ingredient of trafficking, the learned trial judge invoked the presumption under s. 37(da) of the Act as follows (appeal record vol. 1: p. 25):

> Since from the evidence, it is an irresistible inference that the Accused had knowledge of the drugs in the room, section 37(da) of the Act can be invoked,, that the Accused is deemed to be trafficking in drugs.

[14] In respect of the second charge, the learned trial judge stated that (appeal record vol. 1: p. 25):

> Since the Prosecution had proven that the Accused had the custody and control of the two plastic bags that he was caught carrying and the seven (7) packets in his pocket, the Prosecution is entitled to rely on the above stated presumption.
>
> However, from the surrounding facts, it can be also irresistibly inferred that the Accused knew what he was carrying in the two (2) plastic bags and in his pocket.

[15] On the element of trafficking, the learned trial judge said:

> For this ingredient as well, the Prosecution can either prove by direct evidence of trafficking as defined in section 2 of the Act or invoke the presumption under section 37(da) of the Act.

[16] The learned trial judge proceeded to state the following in respect of the second charge (appeal record vol. 1: p. 26):

> Since from the facts of this case, knowledge can be inferred from the surrounding circumstances or it can be invoked under section 37(d) of the Act, this element of trafficking as defined under section 2 of the Act can be proven by direct evidence, or presumed under section 37(da) of the Act bearing in mind the law against double presumption.

If section 37(da) of the Act is invoked for the element of knowledge, then the Prosecution would have to prove trafficking as defined in section 2 of the Act.

[17] And at p. 27 of the appeal record:

The Accused was seen coming out/walking out of the Sunway Pyramid. This would show that he was from one place and going to another place. Thus the element of transporting/carrying the drugs from one place to another.

Then, the amount of drugs (4847.2grams) would be a strong inference that is for trafficking – *Ong Ah Chuan v. PP* [1981] 1 MLJ 64, a Privy Council decision which was later applied by the Court of Appeal in the case of *Mohamed Yazri Minhat v. PP* [2003] 2 CLJ 65.

However, on the other hand if the element of knowledge is proven from the fact of the case, the Prosecution can rely on the presumption under section 37(da) of the Act in establishing the element of trafficking.

Thus, in respect of the drugs found on the Accused trafficking is proven by either way ie, direct evidence or by invoking the presumption.

[18] The learned trial judge concluded that all the ingredients of the both the charges had been proven. The appellant was called upon to enter his defence.

The Defence

[19] The appellant gave evidence under oath. His defence as summarised by the learned trial judge was:

(i) He hails from Nigeria and came to Malaysia in 2007 to study;

(ii) He was a fourth year Computer Science student at the W.I.T. College in Klang. In Malaysia, he stayed at Mentari Court Apartment, Subang Jaya with his two friends;

(iii) On 9 November 2010, around 9.30am, he went to an African restaurant in Sunway Pyramid, Subang Jaya;

(iv) At about 1pm, after he had finished eating, he left Sunway Pyramid and headed towards a nearby bus stop;

(v) At the bus stop, he met a friend by the name of Chinedu. Chinedu was staying at No. 4, SS12/2D, Subang Jaya with Moses, who was also a friend of the appellant;

(vi) At that moment, Chinedu was seen holding two bags (P12A and P13A). While talking, Chinedu suddenly threw the bags on the ground and ran away;

(vii) The appellant looked behind him and saw a group of men rushing towards him. He was arrested whilst one of the men tried to chase Chinedu but was to no avail;

(viii) Later the appellant found out that those people were police officers. The police asked where Chinedu lived. The appellant took them to Chinedu's house in Subang Jaya;

(ix) At Chinedu's house, there were three other persons, ie, Moses, Wahab and one Malay guy. All of them were also arrested by the police but the Malay guy was released right after;

(x) The police then conducted a search around the house. There were three bedrooms in the house. The police attempted to enter the second room in the house but it was locked;

(xi) Moses showed them the key to the second room that was on a table when asked by the police;

(xii) Using the key shown by Moses, the police opened the door and found a brown plastic bag on the closet. The plastic bag contained dried plant material suspected to be cannabis; and

(xiii) The appellant, Moses and Wahab were later taken to the police station.

[20] At the conclusion of the trial, the learned trial judge found the defence to be lacking in probability, possibility and logic and without any evidential support. The prosecution was found to have proved its case beyond reasonable doubt. The appellant was convicted and sentenced to death, hence the appeal.

The Appeal

[21] Before us, learned counsel canvassed the following grounds:

(i) the learned trial judge erred in her approach in the handling of the presumptions and the finding of *prima facie* in respect of the two charges;

(ii) the learned trial judge erred when Her Ladyship made no ruling whether s. 37(da) presumption had been rebutted; and

(iii) the learned trial judge failed to adequately appreciate the defence of the appellant.

[22] In respect of the first ground, relying on the case of *Seyedalireza Seyedhedayatollah Ehteshamiardestani v. PP* [2014] 4 CLJ 406 and *Soorya Kumar Narayanan v. PP* [2009] 6 CLJ 257, learned counsel submitted that the learned trial judge committed an error in her ruling that there was a *prima facie* case. The error was in the learned trial judge's failure to make a definite finding as regards the second charge whether it was a case of deemed possession under s. 37(d) read with the acts of trafficking under s. 2 of the Act or whether it was a case of actual possession read with the trafficking presumption under s. 37(da) of the Act.

[23] The second ground concerned the invocation of presumption of trafficking under s. 37(da) for the first charge. Learned counsel highlighted that Her Ladyship did not make an affirmative finding of possession and did not find whether the presumption had been rebutted, which was incumbent for her to do so. Learned counsel argued that the omission of the learned trial judge amounted to an appealable error.

[24] The third ground of appeal was in respect of Moses and Sani Wahab who were not called by the prosecution and not offered to the defence.

Our Findings

[25] We will consider the first and the second grounds of appeal together. It cannot be denied that reading the grounds of judgment as a whole, we were left in a state of doubt whether the *prima facie* case on the second charge was premised on presumed possession under s. 37(d) and trafficking under s. 2 of the Act or whether it was on actual possession and presumed trafficking under s. 37(da) of the Act.

[26] This court had the occasion to consider similar issues in *Seyedalireza (supra)*. The learned trial judge in *Seyedalireza (supra)* had committed the same error where Her Ladyship had invoked both presumptions under s. 37(d) and (da) of the Act in the alternative and had failed to make a finding at the end of the defence case as to whether the appellant had rebutted the presumption.

[27] In *Seyedalireza (supra)*, this court had unanimously ruled that the approach of the trial judge in merely relying on the alternative without electing or making a finding whether it was actual or presumed possession and whether it was presumed or actual trafficking based on the evidence before the trial judge, amounted to a misdirection by way of a non-direction. The order of conviction and sentence of the High Court was set aside and the appellant was acquitted and discharged. The order of this court in *Seyedalireza (supra)* was affirmed by the Federal Court *vide* Mahkamah Persekutuan Rayuan Jenayah 05-53-03-2014(B).

[28] As for the first charge, we noted that the learned trial judge had invoked the presumption of trafficking under s. 37(da) of the Act (Appeal Record Vol. 1 p. 25). However, nowhere in the grounds of judgment of the learned trial judge did Her Ladyship make a finding on possession.

[29] In *Soorya Kumar Narayanan (supra)* Ahmad Maarop JCA (now FCJ) said at p. 268:

> [17] We now come to a more serious misdirection. This occurred when the learned judge found that the defence had failed to rebut the presumption of trafficking under s. 37(da)(vi) of the Act. On the basis of the law as stated in *Muhammed b. Hassan v. PP (supra)*, this finding presupposes that the learned trial judge was satisfied that the said presumption had arisen in the first place. The question is when was he

> so satisfied? We have said earlier that before the presumption under s. 37(da) of the Act can arise, there must be an affirmative finding of possession. As we have demonstrated, the learned judge did not make an affirmative finding of possession at the close of the prosecution's case. So, his finding regarding the defence's failure to rebut the presumption under s. 37(da) of the Act is really bewildering ...

[30] Apart from the failure of the learned trial judge to make an affirmative finding on possession in respect of the first charge, Her Ladyship had also failed to make a finding whether the appellant had rebutted the presumption of trafficking under s. 37(da). Based on decided cases this omission was a material misdirection, warranting appellate intervention (see for eg, *Mohamad Radhi bin Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (rep) 311; [1991] 3 MLJ 169 at p. 172; *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705 at p. 720; *Bahram Nikkhouyabgram Nayed v. PP* [2013] 6 CLJ 702 at p. 723; and *Seyedalireza Seyedhedayatollah (supra)* at p. 417).

[31] Given the above, we found merits in the first two grounds canvassed by learned counsel, on which grounds the appeal ought to succeed.

[32] Moving on nevertheless to the third issue, learned counsel argued that the learned trial judge failed to appreciate the defence, in particular, the aspect of the defence which was related to Moses and Sani Wahab who were arrested in the hall of the said house. Both of them were released after 14 days of remand. Since it was the defence that the second room was not occupied by the appellant but by Chinedu, learned counsel contended that the defence was prejudiced by the failure of the learned judge to consider Moses because Moses, who was the tenant of the said house, could confirm whether Chinedu occupied the second room.

[33] We found that Moses and Sani Wahab were not fictitious characters. SP5 in his evidence had stated (appeal record vol. 1: p. 75):

> Sampai di sana saya dapati pintu grill dan sliding door tidak tertutup. Kemudian saya dan pasukan serbuan telah masuk ke rumah tersebut dapati ada 2 penghuni di rumah tersebut yang ada di ruang tamu yang mana penghuni pertama dikenali sebagai Moses dan penghuni kedua dikenali sebagai Sani Wahab. Kedua-dua penghuni warganegara Nigeria.

[34] SP7 had similarly testified regarding Moses and Sani Wahab (appeal record vol. 2: p. 131):

> Moses dan Sani Wahab telah dibebaskan atas arahan DPP. ... Dibebaskan dengan bon 118 untuk Moses. ... Saya tidak boleh dapatkan Moses ini. ... Berdasarkan siasatan penyewa rumah ini adalah OKT dan Moses.

[35] It was further in evidence that from Moses, the police also recovered a bunch of four keys (see the search list at appeal record vol. 4: p. 368).

[36] The learned trial judge did not make any finding regarding the non-calling of Moses and Sani Wahab although the issue was canvassed by the defence in the court below (appeal record vol. 3: pg 256-258). Once evidence was placed before the court and submissions made, the learned trial judge was under a statutory duty to make a finding. The omission of the learned trial judge to do so had occasioned a failure of justice to the appellant (see *Lim Pah Soon v. PP* [2013] 8 CLJ 800).

[37] We were unanimous in our view that in the light of the infirmities in the grounds of judgment, the conviction was not safe. The appeal was therefore allowed. The conviction and sentence of the High Court was set aside. The appellant was acquitted and discharged.